

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

RAPHAEL RAINEY,	:	MOTION TO VACATE
BOP # 65991-019,	:	28 U.S.C. § 2255
Movant,	:	
	:	CRIMINAL NO.
v.	:	1:14-CR-170-WSD-JKL-1
	:	
UNITED STATES OF AMERICA,	:	CIVIL ACTION NO.
Respondent.	:	1:16-CV-2270-WSD-JKL

ORDER AND FINAL REPORT AND RECOMMENDATION

Movant, Raphael Rainey, confined in the Oakdale I Federal Correctional Institution in Oakdale, Louisiana, submitted a motion under 28 U.S.C. § 2255 to vacate, set aside, or correct sentence by a person in federal custody (“motion to vacate”). [Doc. 18.] The motion to vacate is before the Court for preliminary review under Rule 4(b) of the Rules Governing Section 2255 Proceedings for the United States District Courts. Summary dismissal of a motion to vacate is proper “[i]f it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief” 28 U.S.C. foll. § 2255, Rule 4(b). For the reasons given below, the undersigned recommends that the motion to vacate be dismissed as untimely.

I. Discussion

On August 4, 2014, Movant pleaded guilty to (1) conspiracy to commit robbery, in violation of 18 U.S.C. § 1951(a), and (2) robbery, in violation of 18 U.S.C. §§ 2 and 1951(a). [Docs. 1, 12.] On October 15, 2014, the District Court sentenced Movant to eighty-five months of imprisonment followed by three years of supervised release. [Docs. 15, 16.] Movant did not appeal. [Doc. 17.] Movant failed to execute his motion to vacate, which he filed on June 27, 2016. [Doc. 18 at 13.]

A motion to vacate is subject to the one-year statute of limitations provided by 28 U.S.C. § 2255(f). The one-year period runs from the latest of the dates on which (1) Movant's convictions became final; (2) a Government impediment to making the motion to vacate was removed; (3) a right that Movant asserts was initially recognized by the United States Supreme Court, if the right has been newly recognized and made retroactively applicable to cases on collateral review; or (4) Movant, with due diligence, could have discovered the facts supporting his claims. *See* 28 U.S.C. § 2255(f)(1)-(4).

Under § 2255(f)(1), Movant had fourteen days in which to appeal his convictions after the District Court sentenced him on October 15, 2014. *See* Fed. R. App. P. 4(b)(1)(A)(i). Movant did not appeal, and the fourteen-day period expired on

October 29, 2014. Thus, Movant's convictions became final on that date, and the one-year statute of limitations in § 2255(f)(1) expired on October 29, 2015.¹ Movant filed his motion to vacate nearly eight months late, on June 27, 2016. Movant does not indicate that the circumstances set forth in § 2255(f)(2) and (4) apply to him.

Movant argues that § 2255(f)(3) applies to him because his sole ground for relief is based on *Johnson v. United States*, 135 S. Ct. 2551 (2015), and *Welch v. United States*, 136 S. Ct. 1257 (2016). [Doc. 18 at 4, 10, 12.] However, the District Court has determined that "Movant's claims do not fall within the scope of [*Johnson* and *Welch*]." [Doc. 22 at 1; Doc. 23 at 1.]² Therefore, § 2255(f)(3) does not apply to Movant.

"Equitable tolling is appropriate when a [movant] untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence." *Sandvik v. United States*, 177 F.3d 1269, 1271 (11th Cir. 1999) (per curiam). Movant is not entitled to equitable tolling because he does not raise any

¹ The one-year period is calculated using the "anniversary method, under which the limitations period expires on the anniversary of the date it began to run." *Downs v. McNeil*, 520 F.3d 1311, 1318 (11th Cir. 2008) (internal quotation marks omitted).

² *Johnson* and *Welch* apply to offenders who received enhanced sentences for convictions under 18 U.S.C. § 922(g). Movant was convicted under § 1951(a), not § 922(g).

extraordinary circumstances that occurred during the one-year period in which he could have sought § 2255 relief.

“Actual innocence is not itself a substantive claim, but rather serves only to lift the procedural bar caused by [a movant’s] failure timely to file [a] § 2255 motion.” *United States v. Montano*, 398 F.3d 1276, 1284 (11th Cir. 2005) (per curiam). To demonstrate actual innocence, a movant must “support his allegations of constitutional error with new reliable evidence . . . that was not presented at trial.” *Schlup v. Delo*, 513 U.S. 298, 324 (1995). A movant “must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.” *Id.* at 327. Movant has not presented new reliable evidence demonstrating actual innocence.

Accordingly, the undersigned recommends that the motion to vacate be dismissed as untimely. Movant’s motion to appoint counsel [Doc. 19] is due to be denied because the interests of justice do not require the appointment of counsel for an untimely motion to vacate. *See* 18 U.S.C. § 3006A(a)(2)(B).³

³ Movant also filed an incomplete motion for leave to appeal *in forma pauperis* [Doc. 20], which is pending before the District Court. Movant may have intended to seek leave to proceed *in forma pauperis* as to his motion to vacate. If so, Movant’s motion for leave to appeal *in forma pauperis* is due to be denied as moot because there is no filing fee for a motion to vacate.

II. Certificate of Appealability

Pursuant to Rule 11(a) of the Rules Governing Section 2255 Proceedings, “[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. . . . If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2).” Section 2253(c)(2) states that a certificate of appealability may issue “only if the applicant has made a substantial showing of the denial of a constitutional right.” A substantial showing of the denial of a constitutional right “includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the [motion to vacate] should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks omitted).

When the district court denies a [motion to vacate] on procedural grounds without reaching the prisoner’s underlying constitutional claim . . . a certificate of appealability should issue only when the prisoner shows both that jurists of reason would find it debatable whether the [motion] states a valid claim of the denial of a constitutional right *and* that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Jimenez v. Quarterman, 555 U.S. 113, 118 n.3 (2009) (citing *Slack*, 529 U.S. at 484) (internal quotation marks omitted).

A certificate of appealability should be denied because the resolution of the issues presented is not debatable. If the District Court adopts this recommendation and denies a certificate of appealability, Movant is advised that he “may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22.” 28 U.S.C. foll. § 2255, Rule 11(a).

III. Conclusion

Based on the foregoing, Movant’s motion to appoint counsel [Doc. 19] is **DENIED**. The undersigned **RECOMMENDS** that the motion to vacate [Doc. 18] be **DISMISSED** as untimely and a certificate of appealability be **DENIED**.

The Clerk is **DIRECTED** to terminate the referral of the motion to vacate to the undersigned.

IT IS SO ORDERED AND RECOMMENDED, this 21st day of July, 2016.



JOHN K. LARKINS III
UNITED STATES MAGISTRATE JUDGE